BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JANICE A. FERGUSSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 220,790
CARDIE OIL, INC.	)	
Respondent	)	
AND	)	
	)	
FARMLAND INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Bryce D. Benedict on May 18, 1998. The Appeals Board heard oral argument September 11, 1998.

APPEARANCES

Randy S. Stalcup of Wichita, Kansas, appeared on behalf of claimant. Frederick L. Haag of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge found claimant has a scheduled injury at the shoulder level and awarded benefits based on an 8 percent permanent partial disability to the shoulder. On appeal, claimant contends her disability is to the body as a whole and asks for an award of work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the evidence, the Appeals Board concludes the Award should be modified to a 39.5 percent work disability.

Findings of Fact

1. Claimant was injured on September 4, 1996, while unloading a case of antifreeze. Claimant described the pain location as a golf-ball sized area between her spine and shoulder blade. She stated the spot was off her spine about an inch over to her shoulder blade.

2. Claimant received treatment first from Dr. D. R. Scharenberg, a chiropractor. After 10 to 14 visits, she concluded this was not helping and began seeing another chiropractor, Dr. Eric Keating. Dr. Keating treated claimant twice per week for approximately six months and eventually referred claimant to Dr. Dennison R. Hamilton, an orthopedic physician.

3. Dr. Hamilton recommended physical therapy and cortisone shots. Claimant testified the shots were into her shoulder blade.

4. Claimant last worked for respondent on November 30, 1996. She obtained employment as of December 1, 1996, with Ampride, a company that bought respondent Cardie Oil. Claimant worked at Ampride only one day and then, when it appeared there was nothing for her to do, received what she described as a mutual layoff. Claimant testified she would have had to drop to a cashier position and would not receive the pay she was receiving as a supervisor. Claimant also testified she did not receive another job offer from Ampride.

5. In January 1997, claimant obtained employment with Exide. She worked there for approximately 1½ months. Her last day was February 25, 1997. At Exide, claimant washed batteries and put caps and handles on them as they came down a conveyor belt. Claimant left this employment because she could not tolerate the pain caused by the work.

6. Claimant first saw Dr. Hamilton on March 10, 1997. He diagnosed right dorsal scapular nerve neuralgia secondary to thoracic sprain. Dr. Hamilton testified that he gave injections to the dorsal scapular nerve, a nerve which he testified runs to the spine side of the scapula. At the next exam on March 17, 1997, claimant reported substantial improvement in her pain and Dr. Hamilton gave a second injection. As of April 7, 1997, Dr. Hamilton concluded claimant had reached maximum medical improvement but claimant continued to have tenderness in the interscapular region and range of motion in her mid-back aggravated her pain. Dr. Hamilton saw claimant again on June 23, 1997, and August 11, 1997, with no significant change noted in her condition.

Dr. Hamilton rated her impairment as 7 percent of the whole body. The rating included 5 percent for the dorsal scapular neuritis and 2 percent for the thoracic sprain or strain. He recommended restrictions as follows:

> She should avoid lifting more than 10 pounds and she should avoid activities that require repetitive bending, twisting, turning, reaching, pushing, pulling, lifting, and carrying.

Dr. Hamilton reviewed a task list prepared by Karen C. Terrill and agreed claimant has lost the ability to perform 61 percent of the tasks claimant had performed in the 15 years before the injury.

7. Claimant sought other employment beginning in November 1997, after being released by Dr. Hamilton. She identified eight employers she contacted. She was then on unemployment compensation from November 1997 to the time of the regular hearing in March 1998 and sought employment from at least two employers per week while on unemployment compensation. Two weeks before the regular hearing held in this case on March 5, 1998, claimant started working at Salon I for $6 per hour, or 55 percent commission, whichever is greater. She had received only one paycheck, one for a two-week period, and it was in the amount of $94.20, her net pay for the period February 11, 1998, through February 25, 1998. Claimant was expected to work 32 hours per week but had not reached this.

8. Claimant was examined and evaluated by Dr. Vito J. Carabetta at the request of respondent's counsel. Dr. Carabetta saw claimant February 24, 1998. He diagnosed regional myofascitis affecting the right rhomboid musculature. Dr. Carabetta testified that the rhomboid muscles are part of the shoulder structure and part of the shoulder musculature. It is a muscle which is attached to the shoulder blade and it causes the shoulder to retract or to be pulled backwards. Dr. Carabetta rated the impairment as 5 percent at the shoulder level. Dr. Carabetta disagreed with Dr. Hamilton's diagnosis for several reasons. He considered the mechanism of injury unlikely to have produced injury to the dorsal scapular nerve. He found no evidence that the nerve block had provided long-lasting relief. He would have expected different symptoms if there were a thoracic sprain.

9. Claimant was also examined by Dr. Gael R. Frank, again at the request of respondent's counsel. He saw claimant November 21, 1997. He diagnosed chronic strain of the right shoulder girdle musculature, specifically the rhomboid major and minor muscles. He also suggested the possibility of a herniated disc in the thoracic spine should be considered. He noted an MRI might be appropriate but he did not think a positive MRI would change the treatment. Dr. Frank initially rated the impairment as 5 percent of the whole body and, when asked what that rating would be if the rating were of the shoulder, he converted it to 8 percent of the right upper extremity at the shoulder level. Dr. Frank disagreed with Dr. Hamilton's diagnosis. He did so in part because he saw no evidence that the injections had provided relief and saw no indication that a second injection had been given.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. The Board concludes claimant has proven a general body disability, not only a scheduled injury to the shoulder. The Board finds Dr. Hamilton's conclusions and opinions

to be more persuasive. The nerve block did provide at least temporary relief. Dr. Hamilton had a better opportunity to observe claimant. Dr. Hamilton concludes claimant's injury included a thoracic sprain or strain resulting in permanent impairment to the thoracic spine.

3. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

4. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation.[1] Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn.[2]

5. The Board concludes claimant has not proven she made a good faith effort to find full-time employment. Claimant could have remained at Ampride but chose not to. We do not know what the wage would have been. Claimant's testimony implies it would have been less than she was earning, but claimant does not state what the wage would have been for what she calls a drop to a cashier position. In the latest job, claimant is earning $6 per hour. Although she works less than a full 40-hour week, there appears no reason she should not. The Board concludes that a wage of $6 per hour for 40 hours, or $240 per week, should be imputed to claimant as her post-injury wage.

6. When the imputed wage of $240 per week is compared to the preinjury wage of $293.55, claimant has a wage loss of 18 percent.

7. Based on the testimony of Dr. Hamilton, claimant has a 61 percent loss of ability to perform tasks.

8. Claimant has a 39.5 percent work disability based on an 18 percent wage loss and a 61 percent task loss. K.S.A. 44-510e.

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[1] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict on May 18, 1998, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Janice A. Fergusson, and against the respondent, Cardie Oil, Inc., and its insurance carrier, Farmland Insurance Company, for an accidental injury which occurred September 4, 1996, and based upon an average weekly wage of $293.55, for 33 weeks of temporary total disability compensation at the rate of $195.71 per week, or $6,458.43, followed by 156.82 weeks at the rate of $195.71 per week, or $30,691.24, for a 39.5% permanent partial disability, making a total award of $37,149.67.

As of March 19, 1999, there is due and owing claimant 33 weeks of temporary total disability compensation at the rate of $195.71 per week, or $6,458.43, followed by 99.29 weeks of permanent partial disability compensation at the rate of $195.71 per week in the sum of $19,432.05, for a total of $25,890.48, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $11,259.19 is to be paid for 57.53 weeks at the rate of $195.71 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this _____ day of March 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS
Frederick L. Haag, Wichita, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director